

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH E. SMITH,)
)
Plaintiff(s),)
)
v.)
)
CITIFINANCIAL RETAIL)
SERVICES and CITIBANK (SOUTH)
DAKOTA), N.A.,)
)
Defendant(s).)
)
_____)

No. C06-2966 BZ

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES**

A victim of identity theft, plaintiff sued defendants for continuing to provide false information about his financial status after he had reported the problem to them. For reasons not completely clear to the court, what should have been a simple matter to resolve resulted in a bitterly contested year long litigation.¹ It was resolved when plaintiff accepted

¹ The underlying dispute arose out of an incident of identity theft, wherein an unauthorized person opened several credit accounts in plaintiff's name. After attempting for several years to have defendants remove the fraudulent account from his credit report, plaintiff brought suit against defendants, alleging violations of the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 et seq., and California's Identity Theft Statute, Cal. Civ. Code § 1798.92 et seq. On

1 defendants' Rule 68 Offer of Judgment of \$75,000 with costs
2 and attorneys' fees to be determined by the court. Plaintiff
3 then moved for an award of \$200,156.25 in attorneys' fees and
4 \$5,954.16 in costs.

5 In opposing plaintiff's motion, defendants argue: (1)
6 that plaintiff's hourly rates are excessive, (2) that there
7 should be a rate differential between Mr. Ogilvie and Ms.
8 Brewer, (3) that the hours worked are excessive, (4) that much
9 of the work should have been performed by an associate rather
10 than a partner, (5) that travel time should have been billed
11 at a reduced rate, (6) that billing for clerical tasks should
12 be disallowed, and (7) that plaintiff should not receive a fee
13 enhancement for those hours dedicated to work on the
14 California Identity Theft claim. Defendants did not oppose
15 plaintiff's request for costs.

16 Because his FCRA action against defendants has been
17 successful, plaintiff is entitled to recover "the costs of the
18 action together with reasonable attorney's fees as determined
19 by the court." 15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2).

20 Similarly, California's Identity Theft Statute provides that a
21 successful plaintiff is entitled to recover "actual damages,
22 attorney's fees, and costs." Cal. Civ. Code § 1798.93(c)(5).

23 "The most useful starting point for determining the
24 amount of a reasonable fee is the number of hours reasonably
25 expended on the litigation multiplied by a reasonable hourly

26 _____
27 November 8, 2006, defendants made a settlement offer of
28 \$8,000. Plaintiff rejected this offer and continued with
discovery until he accepted defendants' Rule 68 Offer of
Judgment.

1 rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). As
2 the party seeking attorneys' fees, plaintiff bears the burden
3 of submitting evidence to support the hours worked and rates
4 claimed. Id. at 433.

5 The starting point for determining a reasonable fee is
6 the hourly rate counsel would have charged had the client been
7 able to pay the attorney's usual rate. Gusman v. Unisys
8 Corp., 986 F.2d 1146, 1149-50 (7th Cir. 1993); Columbus Mills,
9 Inc. v. Freeland, 918 F.2d 1575, 1580 (11th Cir. 1990)
10 ("evidence of a fee structure arrived at by private parties
11 negotiating at arms length is highly persuasive" evidence of
12 prevailing market norms). Although plaintiff's counsel claim
13 that their current hourly rate is \$525, they provide no
14 evidence that they have actually charged or been paid at that
15 rate. While counsel have represented that they were awarded
16 fees at a rate of \$450 per hour in 2004, by Superior Courts in
17 Santa Clara and Los Angeles Counties, they do not specify the
18 type of case or the work they did.

19 Where, as here, it is difficult to ascertain counsel's
20 usual rate, a court may look to the rate charged by attorneys
21 of similar skill and experience for comparable legal services
22 in the community. See Blum v. Stenson, 465 U.S. 886, 893-94
23 (1984); see also Welch v. Metropolitan Life Ins. Co., 480 F.3d
24 942, 946 (9th Cir. 2007). Plaintiff has provided some
25 evidence that other courts in the Northern District of
26 California have recently awarded rates similar to or higher
27 than those now requested. See Decl. of Richard Pearl in Supp.
28 of Pl.'s Mot. For Att'ys' Fees ("Pearl Decl.") ¶ 9. The cases

1 plaintiff cites, however, are not directly analogous to this
2 case, because they involve different or more complex claims
3 and/or attorneys of different experience associated with
4 different-sized firms.² Analogous case law suggests that a
5 somewhat lower rate may be appropriate. See Schueneman v. 1st
6 Credit of America, LLC, 2007 WL 1969708, at *3 (N.D. Cal.)
7 (reducing by \$25 the requested rate in a consumer debt
8 collection practices case and awarding \$300 per hour to an
9 attorney with five years in the field and an additional
10 fourteen years litigation experience); Defenbaugh v. JBC &
11 Assoc., Inc., 2004 WL 1874978, at *5-*7 (N.D. Cal.) (in
12 consumer debt class action, awarding fees of \$435 per hour to
13 attorney with over twenty years practice experience, and
14 awarding \$400 per hour to an attorney with slightly less
15 practice experience).

16 The purpose of awarding fees is to encourage vigorous
17 enforcement of civil rights and consumer-protection laws by
18 competent counsel. See Tolentino v. Friedman, 46 F.3d 645,
19 652-53 (7th Cir. 1995) (citing Student Public Interest
20 Research Group v. AT & T Bell Laboratories, 842 F.2d 1436,
21 1449 (3d Cir. 1988); see also Corder v. Gates, 947 F.2d 374,
22 383 (9th Cir. 1991). This case did not involve particularly
23 complex legal issues. While defendants' intransigency
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26 ² Similarly unhelpful is defendants counsel's
27 provision of evidence of attorneys' rates on a national and
28 statewide basis, without any area of law specificity. See
Decl. of Kurt W. Melchior in Resp. to Pl.'s Mot. For Att'ys'
Fees ("Melchior Decl.") ¶ 21; Req. for Judicial Notice of
Decl. of Alan Charles Dell'Ario ("Dell'Ario Req.").

1 protracted the litigation process,³ such difficulty is
2 accounted for by compensating counsel for the many hours
3 expended. Although plaintiff's counsel might be awarded \$525
4 per hour in an appropriate case, I find that a rate of \$450
5 per hour for Mr. Ogilvie and \$400 per hour for Ms. Brewer⁴ is
6 reasonable and appropriate in this case.⁵

7 I further conclude that the total hours billed by
8 plaintiff's counsel are not excessive, with one exception.
9 Although the total amount of work conducted is perhaps more
10 than should be expected for a case such as this, that is
11 partly the result of defendants' dilatory litigation tactics.
12 Moreover, many of the charges identified by defendants as
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14 ³ During the discovery process, defendants were
15 noticeably reluctant to produce information and documents to
16 plaintiffs, forcing plaintiff to file several motions to
17 compel production of discovery information (see Docket no's
18 51, 71), which required multiple telephonic and in-person
19 discovery conferences to resolve (see Docket no's 63, 78, 80).
20 See also Supplemental Decl. of Andrew J. Ogilvie in Supp. of
21 Pl.'s Mot. For Att'ys' Fees ("Supp. Ogilvie Decl.") ¶¶ 5, 6,
22 14.

23 ⁴ The differential between Mr. Ogilvie's rate and Ms.
24 Brewer's rate is justified by the fact that Ms. Brewer has six
25 years less experience than Mr. Ogilvie, and because of the
26 limited involvement of Ms. Brewer in this case. Ms. Brewer
27 only worked twenty-six and one-half hours on this case, on
28 non-complex matters, making it clear to me that her services
were not particularly central to this case.

⁵ Defendants also contest counsel's billing of all
hours at a partner rate. Defendant's Opposition to
Plaintiff's Attorney Fee Motion ("Def.'s Opp.") at 12.
However, plaintiff's counsel do not have any associates that
could have worked on this case. Decl. of Andrew J. Ogilvie in
Supp. of Pl.'s Mot. for Att'ys' Fees ("Ogilvie Decl.") ¶ 9.
Defendants do not provide any authority, and I know of none,
for their proposition that "associate level work" performed by
a partner should be billed at an associate rate, even when no
associate is available. Therefore, I decline to reduce the
rate for work that could have been performed by an associate.

1 excessive have been shown in plaintiff's reply brief to have
2 been justified.⁶ See, e.g. Supp. Ogilvie Decl. ¶ 9.

3 It appears, however, that plaintiff's counsel bills in
4 quarter-hour increments rather than in a more precise measure
5 of time. The Ninth Circuit has affirmed an across-the-board
6 reduction of attorneys' fees when services were billed on a
7 quarter-hour basis without proper specificity. See Welch, 480
8 F.3d at 948-49. Plaintiff's record of hours worked is replete
9 with quarter-hour, half-hour, and three-quarter-hour charges
10 for review of correspondence, telephone calls, and emails that
11 may have taken less time. See Ex. 1 to Ogilvie Decl. Because
12 of this excessive billing practice, I find that an across-the-
13 board reduction of five percent of plaintiff counsel's
14 requested hours is appropriate. See, e.g. Welch, 480 F.3d at
15 948-49 (affirming an across-the-board reduction of twenty
16 percent where quarter-hour billing resulted in inflated
17 hours).⁷

18 Defendants also attack some of plaintiff's billed work as
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20 ⁶ For example, although defendants cite the billing of
21 five and one-half hours for attending a case management
22 conference, defendants knew that the reason for this was that
23 both parties were required by Judge Wilken to arrive at court
24 by 1:30 p.m., and were required to stay until 5:30 p.m.
25 because their matter was the last item on calendar. Supp.
26 Ogilvie Decl. ¶ 9. Moreover, defendants admit that they spent
27 almost the same number of hours on this case as plaintiffs.
28 Decl. of Regina J. McClendon in Opp. To Pl.'s Mot. For Att'ys'
Fees ("McClendon Decl.") ¶ 28.

⁷ Defendants' request for an hour reduction for travel
time is also unsupported. Defendants do not provide any
support, and I know of none, for their claim that travel time
is customarily billed at fifty percent by attorneys in the San
Francisco Bay Area, and that plaintiff counsel's travel hours
should be reduced accordingly. I decline to make an hour
reduction for time partially spent traveling.

1 clerical tasks that should be compensated at a reduced rate.
2 It is inevitable that attorneys will spend some of their time
3 on quasi-clerical tasks. Here, that time is minimal.
4 Plaintiff has provided sufficient detail to satisfy me that
5 the hours alleged to be clerical can indeed be billed at the
6 standard attorney rate.

7 Lastly, defendants contest plaintiff's request for a fee
8 enhancement for all hours worked on plaintiff's California
9 Identity Theft Statute claim. Plaintiff requested a
10 multiplier of 2.0 for the twenty-eight hours spent working on
11 this claim. Pl.'s Mot. for Att'ys' Fees at 13. Although this
12 Court may not grant a fee enhancement under federal fee-
13 shifting statutes, see, e.g., City of Burlington v. Dague, 505
14 U.S. 557, 566-67 (1992), California courts allow for fee
15 enhancements. See Ketchum v. Moses, 24 Cal. 4th 1112, 1136-38
16 (2001) (allowing for fee enhancements to compensate for
17 contingent risk, exceptional skill, or other factors).
18 However, the court in Ketchum emphasized the trial court's
19 discretion in choosing whether to award a fee enhancement, and
20 affirmed that the party seeking the enhancement bears the
21 burden of proof. Id. at 1138. In this case, plaintiff's
22 counsel have not shown that the California Identity Theft
23 Statute was particularly risky. Moreover, plaintiff's counsel
24 only spent twenty-eight hours, out of 353.25 hours total,
25 working on the California Identity Theft Statute claim.
26 Ogilvie Decl. ¶ 30. This indicates that the claim was neither
27 risky nor particularly important to plaintiff's case. For
28 these reasons, I decline to award a fee enhancement for hours

1 spent pursuing the California Identity Theft claim.

2 For the above-stated reasons,⁸ I hereby **ORDER** that
3 plaintiff's motion for attorney's fees be **GRANTED IN PART** and
4 **DENIED IN PART** as follows:

5 (1) That plaintiff be awarded fees of **\$149,825** as set
6 forth in the attached schedule.

7 (2) That plaintiff be awarded costs of **\$5,954.16**.

8 Dated: August 2, 2007

9 
10 Bernard Zimmerman
United States Magistrate Judge

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26 ⁸ Because I have not relied on any of the contested
27 elements of the Declaration of Kurt Melchior, nor of
28 defendants' Request for Judicial Notice of the declaration on
Alan Charles Dell'Ario in making my decision, defendants'
objections thereto are **OVERRULED** as moot.